Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-631 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS,
Petitioners,

v.

JOHN B. GUINN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

WAYNE FISHER
FISHER, GALLAGHER, PERRIN & LEWIS
Allied Bank Tower, 70th Floor
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

SHELTON SMITH
MICHAEL B. MARTIN
SMITH & STEELE
830 Two Houston Center
Houston, Texas 77010
(713) 659-2727

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

1988

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE TEST OF ACTUAL MALICE UNDER *NEW YORK TIMES V. SULLIVAN* APPLIES TO PUBLIC OFFICIALS NOT KNOWN OUTSIDE THE CONFINES OF THEIR COMMUNITY.

2. WHETHER A DEFAMATORY STATEMENT MUST EXPRESSLY OR IMPLIEDLY IDENTIFY AN INDIVIDUAL AS A PUBLIC OFFICIAL BEFORE THE ACTUAL MALICE STANDARD CAN APPLY.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	III
COUNTERSTATEMENT OF THE CASE	2
1. FACTUAL AND PROCEDURAL BACKGROUND	2
2. THE HOLDING OF THE TEXAS COURT OF APPEALS	4
REASONS FOR DENYING WRIT	5
1. A PUBLIC OFFICIAL MUST BE KNOWN OUTSIDE THE CONFINES OF HIS COMMUNITY BEFORE THE ACTUAL MALICE STANDARD CAN APPLY	6
2. DEFAMATORY STATEMENTS MUST EXPRESSLY OR IMPLIEDLY IDENTIFY THE INDIVIDUAL AS A PUBLIC OFFICIAL	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Beckly Newspaper Co. v. Hanks, 389 U.S. 81 (1967) 10
Garrison v. Louisiana, 379 U.S. 64 (1964) 10
Henry v. Collins, 380 U.S. 64 (1964) 10
Monitor Patriot v. Roy, 401 U.S. 265 (1971) 2, 7, 8, 10, 12
New York Times v. Sullivan, 376 U.S. 254 (1964) ..... *passim*
Oscala Star-Banner v. Damron, 401 U.S. 295 (1971) ..2, 5, 9, 10, 12
Rosenblatt v. Baer, 383 U.S. 75 (1966) 10
St. Amant v. Thompson, 390 U.S. 727 (1968) 10
Times v. Pape, 401 U.S. 279 (1971) 10

TEXAS SUPREME COURT CASES

Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), *cert. denied* 429 U.S. 1123 (1977) 4, 10, 11

TEXAS COURT OF APPEALS CASES

Durham v. Cannan Communications, Inc., 645 S.W.2d 849, 850 (Tex. App.—Amarillo 1982, writ dism'd w.o.j.) ... 4

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION AMENDMENT I 5, 12

NO. 88-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS,
Petitioners,

v.

JOHN B. GUINN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

Respondent files this response to Petitioners' Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas ("Texas Court of Appeals") in No. B14-86-674-CV issued on July 2, 1987. This response is filed pursuant to the Court's instruction that a written response be filed on or before December 30, 1988.

COUNTERSTATEMENT OF THE CASE

1. Factual and Procedural Background

This appeal involves the application of the First Amendment as interpreted by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) (*New York Times v. Sullivan*), *Monitor Patriot v. Roy,* 401 U.S. 265 (1971), and *Oscala Star-Banner v. Damron,* 401 U.S. 295 (1971). The question before the Court is whether the test of actual malice under *New York Times v. Sullivan* applies to all public officials, at all times, in all places, as a matter of law.

At the time of the publication of the defamatory article in question, Respondent, John B. Guinn, was an elected Justice of the Peace in Coryell County, Texas, an appointed municipal court judge in Copperas Cove, Texas, and a practicing attorney and member in good standing of the State Bar of Texas. There is no dispute that Judge Guinn was and remains a *per se* public official in his hometown.

This lawsuit and subsequent appeal was filed after the Petitioners, Texas Newspapers, Inc., Cox Enterprises, Inc. d/b/a "Waco Tribune Herald" and Mary Ann Kreps, published a newspaper article which falsely reported that Judge Guinn had been convicted of felony theft. The article inaccurately reported that Judge Guinn had been convicted and sentenced to five years probation:

> John B. Guinn, 44, of Copperas Cove was given a five year probated sentence and ordered to pay restitution for theft on a government reservation.

The publication of this obvious falsehood occurred due to the confusion of Judge Guinn's name with that of Michael B. Fuller, the defendant for whom Respondent had acted as counsel.

This patently libelous news article was written by Petitioner, Mary Ann Kreps, who was responsible for reporting the legal proceedings for both state and federal courts in the Waco area. At the time the article appeared, Judge Guinn was serving as the Justice of the Peace for Coryell County and was also an appointed Associate City Judge presiding in Copperas Cove, Texas.[1] However, the circumstances which led to the article's publication had nothing to do with Guinn's responsibilities as a judge. These events were negligently reported while Judge Guinn was acting as a private attorney retained to defend Fuller.

Judge Guinn then brought suit against the Petitioners to recover actual and punitive damages for defamation. Petitioners were granted a summary judgment in Texas District Court based upon Guinn's deposition testimony which acknowledged that he served in several capacities as a local judge in Copperas Cove. This testimony served as the basis for the Trial Court's conclusion that Petitioner was a public official and therefore subject to the actual malice standard of *New York Times v. Sullivan.*

Respondent appealed to the Texas Court of Appeals, Fourteenth Supreme Judicial District, which reversed and remanded the case for trial. The Texas Supreme Court

---

1. As noted in Petitioners' Brief, Copperas Cove in Coryell County is the home of Judge Guinn. Guinn's hometown and the Court in which he sits is located approximately 100 miles from Waco.

denied Petitioners' application for writ of error and overruled their motion for rehearing.

2. The Holding of the Texas Court of Appeals

On appeal, Respondent did not dispute that he was, in fact, a *per se* public official by virtue of his holding a government office. However, the Court of Appeals correctly recognized that Respondent's status as a "public official" did not mandate automatic application of the actual malice standard under *New York Times v. Sullivan.*

The Texas Court of Appeals held that there was no proof that Guinn was known outside the confines of his community. *Durham v. Cannan Communications, Inc.,* 645 S.W.2d 849, 850 (Tex. App.—Amarillo 1982, writ dism'd w.o.j.). The Court of Appeals limited the application of the *New York Times v. Sullivan* rule, based upon the fact that the libelous statements were made in a metropolitan area over 100 miles away from Judge Guinn's hometown. The Court of Appeals correctly held that a fact issue existed as to whether the Petitioners could invoke the *New York Times v. Sullivan* rule in these particular circumstances.

The Court further recognized that because the content of the news article did not mention nor relate to Guinn's official conduct as a judge, nor did the article relate to Guinn's performance of his official duties, Guinn was not a public official for purposes of *New York Times v. Sullivan. Foster v. Laredo Newspapers, Inc.,* 541 S.W2d 809, 814-15 (Tex. 1976), *cert. denied* 429 U.S. 1123 (1977).

The Court of Appeals then concluded that as a matter of law, the *New York Times v. Sullivan* rule cannot be

automatically applied in all circumstances to all public officials. The Court held that factual questions relating to the context in which the defamatory remarks are published and the circumstances of the public official's status in the region must be addressed before applying the *New York Times v. Sullivan* rule of actual malice.

REASONS FOR DENYING THE WRIT

The holding of the Texas Court of Appeals supports the proposition that absolute immunity for political libel is not allowed under the First Amendment. This Court has previously suggested that the actual malice rule under *New York Times v. Sullivan* should not be automatically applied in all public official defamation cases. *Oscala Star-Banner Co. v. Damron,* 401 U.S. 295 (1971).

Respondent agrees that the First Amendment must preserve the right of the press to freely report and criticize the conduct of public officials. However, the First Amendment should not allow the press to, *carte blanche,* impugn the reputation of any public official, in any place, at any time, for any reason, no matter what the circumstance.

This Court has the opportunity to affirm the Texas Court of Appeals' determination that the actual malice standard under *New York Times v. Sullivan* should not be applied as a matter of law in all defamation cases involving elected public officials. There are certain factual inquiries which should serve as a predicate to application of the actual malice standard. At the minimum, it should be determined that the libelous statement was published in an area or region where the complainant serves as a public official, or where he is at least generally known to be a public official.

Clearly, a minor office-holder in a remote and rural county should not automatically be considered a public official in a distant metropolitan area, for purposes of triggering application of the *New York Times v. Sullivan* rule. Otherwise, all such *de facto* "public officials" would be fair game for any newspaper in the country to freely defame such a person then hide behind the protective rule of *New York Times v. Sullivan* by asserting that the defamed was, for all purposes, in all places, and at all times a "public official."

Furthermore, if the libelous news article fails to expressly identify or refer to such a minor office-holder in his official capacity and does not associate him with his office, then the defamed should not automatically be a "public official" for purposes of *New York Times v. Sullivan*. This Court should overrule Petitioners' writ in light of previous holdings indicating that the actual malice standard may not always apply in public official defamation cases.

1. A Public Official Must Be Known Outside The Confines Of His Community Before The Actual Malice Standard Can Apply.

Judge Guinn contends that although he was an elected judge in his home county, he most certainly was not a public official or public figure in the Waco metropolitan area located over 100 miles away. This fact issue is best illustrated by the Petitioner, Mary Ann Kreps, (the courthouse reporter and author of the article in question) who admitted under oath that "[P]rior to January 23, 1984, I had never heard of and did not know either

Michael Blair Fuller or John B. Guinn." *See* Petitioners' Appendix A, Exhibit B, p. 23a.

In support of their Petition, Petitioners cite Justice Stewart's opinion in *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1970), wherein the Court held that, as a matter of constitutional law, "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times v. Sullivan.*" *Id.* at 277. However, the Court in *Monitor* did not hold that a false charge of criminal conduct is *dispositive* of the issue, only that it can never be "irrelevant" for procedural or evidentiary purposes. *Id.*

Despite the "relevancy" of this evidentiary inquiry, a person's status as a public official is not determinative of whether the actual malice standard should apply. Allegations of criminal conduct may be relevant to the defamation proceeding, but this allegation alone does not mandate application of *New York Times v. Sullivan.* There must be a factual inquiry into whether the official is known or perceived to actually be a public official in the community where the libelous statements are made.

The Court has recognized that application of the *New York Times v. Sullivan* rule is not absolute and that there may be situations where public officials are not subject to the burden of the actual malice rule. In *Monitor Patriot,* Justice Stewart wrote:

> Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness

> for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel. *But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case.*

Id. at 275 (emphasis added).

Clearly, there remains that unanswered question as to whether there is a particular circumstance where the press should not properly be afforded the almost impenetrable veil of constitutional protection under the actual malice standard of *New York Times v. Sullivan.* Respondent vigorously contests the issue that is most often not even contested in public official defamation cases: whether an elected government office-holder is invariably a "public official," at all times, in all places, and in all circumstances so as to automatically trigger the actual malice standard of *New York Times v. Sullivan.*

Respondent urges the Court to recognize the reality that a minor office-holder, who is not identified and certainly not known as a public official outside the confines of his community, should not automatically be subject to the actual malice standard when he is defamed by a newspaper in a distant city.

Petitioners may plead and they may attempt to prove by competent and credible evidence that a Coryell County Justice of the Peace and City Judge is in all places a public official, but they should not be permitted to assume this advantage as a matter of law. The issue of whether Judge Guinn is a public official in Waco, or Houston, or New York is a fact question that must properly be determined by a jury.

2. Defamatory Statements Must Expressly Or Impliedly Identify The Individual As A Public Official.

Because no reference was made in the libelous article that John Guinn was a judge or that he was acting in his official capacity, the actual malice rule should not apply.

Inquiry into whether reference to a public official's "official capacity" is required in political libel cases was invited by this Court in *Oscala Star-Banner v. Damron,* 401 U.S. 295 (1971). In *Oscala,* the plaintiff, who was mayor and candidate for county tax assessor, filed a libel action against a local newspaper as a result of an article which falsely stated he had been indicted on perjury charges in Federal Court. Like the present case, the article referred to plaintiff individually but made no mention that he was a public official. Although this Court held the *New York Times v. Sullivan* rule was applicable, it further observed:

> Both the trial judge on motion for new trial and the District Court of Appeals rested their conclusion that the *New York Times* rule did not apply partly on the ground that the defamatory article nowhere mentioned the respondent's status as Mayor of Crystal River or as candidate for County Tax Assessor. The Defendant has not pursued this theory here.

Id. at 300, n. 4.

The *Oscala* footnote suggests this Court's willingness to recognize an exception to the *New York Times v. Sullivan* rule no different from the invitation asserted by

Justice Stewart in *Monitor Patriot Co. v. Roy,* 401 U.S. at 275. This observation is further highlighted by the unique factual circumstances of both *Oscala* and the case at bar. Both *Oscala* and the present case deal with situations where no reference is made to a public official's position or the performance of his duties. On the other hand, almost every other Supreme Court case applying the *New York Times v. Sullivan* rule involved libelous statements which specifically identified the public official and the performance of his duties.[2]

Furthermore, the Texas Supreme Court decision which was controlling in the Court of Appeals held that the *New York Times v. Sullivan* rule did not apply if the newspaper article failed to specify that the plaintiff was a public official or that he was acting in his official capacity. *Foster v. Laredo Newspaper, Inc.,* 541 S.W.2d 809 (Tex. 1976). In *Foster,* the Texas Supreme Court held that because no express reference was made to Foster's official position "the allegedly libelous state-

---

2. *See e.g. Beckly Newspaper Co. v. Hanks,* 389 U.S. 81 (1967) (published statements applied to candidate in political campaign); *St. Amant v. Thompson,* 390 U.S. 727 (1968) (published statements related to County Sheriff accused of criminal conduct in the course of duty); *Monitor Patriot v. Roy,* 401 U.S. 265 (1971) (publication related to a senatorial candidate's activity as a former bootlegger); *Rosenblatt v. Baer,* 383 U.S. 75 (1966) (article referred to County Ski Supervisor's official duties and implied that he embezzled funds); *Times v. Pape,* 401 U.S. 279 (1971) (report on police violence related to police commissioner's official conduct); *Garrison v. Louisiana,* 379 U.S. 64 (1964) (statements of criminal conduct related to District Judge's official duties); *Henry v. Collins,* 380 U.S. 64 (1964) (accusations that a County Attorney and Chief of Police were involved in a 'diabolical plot' related to the official duties of each public official).

ments did not concern Foster's 'official conduct' ". *Id.* at 815.[3]

This Court's denial of certiorari in the *Foster* decision suggests that the exception to the actual malice standard is consistent with this Court's precedent in *New York Times v. Sullivan.*

The policy behind the actual malice rule of *New York Times v. Sullivan* has been to cultivate free and open debate of public issues through the press. The actual malice standard guarantees that "the government remains responsive to the will of the people by allowing open scrutiny of a public official in the execution of his duties." *New York Times v. Sullivan,* 376 U.S. at 269.

These constitutional interests are not served when the press does not inform the public that the reported unlawful conduct was that of a public official. Scrutiny of governmental affairs can never be served if the public is unaware that the defamed individual was a public office holder. No goal toward the "ascertainment of truth" of a public official's conduct will be obtained if the public believes that the "public official" is a private person.

A factual inquiry must be made into whether the defamatory statements relate to a public official's official duties or whether these statements are perceived by the

---

3. Respondent recognizes there may be some instances where the absence of an express reference to an individual's official capacity is unimportant. Certainly there may be instances where a public official is so well-known that the general public automatically associates him with his office. Respondent does not believe that such a situation exists in this case but would, nevertheless, assert that this determination is, at the very least, a fact question for the jury.

community as being associated with a public official's competency and office. Only then should a public official be subject to the actual malice standard.

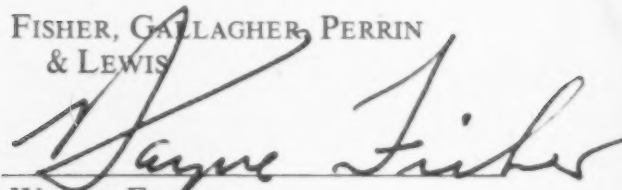
The actual malice rule should not protect the press from accountability for publication of any falsehood about any public official, at any time, in any place. To hold otherwise would serve to destroy a public official's right to protect his private reputation from unjustified invasion and irreparable damage. It would also mean that no public official, however minor his position or remote his station, would ever have a viable cause of action for defamation. This should not be the law.

CONCLUSION

The holding of the Texas Court of Appeals is consistent with the policy and intent of the actual malice standard under *New York Times v. Sullivan.* Although this Court has not yet directly addressed this particular issue, the invitations suggested by this Court in *Monitor Patriot v. Roy* and *Oscala Star-Banner Co. v. Damron,* indicate that the Court of Appeals' holding is consistent with the principles of the First Amendment of the United States Constitution. Respondent therefore respectfully requests this Honorable Court to uphold the Texas Court of Appeals' ruling that the actual malice standard does not apply to all public officials as a matter of law.

Respectfully submitted,

FISHER, GALLAGHER, PERRIN
& LEWIS

By: 

WAYNE FISHER
TBA #00000056

70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

SHELTON SMITH
TBA #18578500

SMITH & STEELE
830 Two Houston Center
Houston, Texas 77010
(713) 659-2727

MICHAEL B. MARTIN
TBA #13094400
830 Two Houston Center
Houston, Texas 77010

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record on this the 29 day of December, 1988.

WAYNE FISHER